

No. 11853

United States
Circuit Court of Appeals
For the Ninth Circuit

ARIZONA BARITE COMPANY, a Corporation,
Appellant,

vs.

WESTERN-KNAPP ENGINEERING CO., a
Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

MAR 26 1948

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Additional Summons and Return of Service...	28
Return on Service of Writ.....	29
Appeal:	
Clerk's Certificate to Transcript of Record	
on	39
Cost Bond on.....	34
Designation by Appellant of Contents of	
Record on	37
Notice of	33
Statement of Points Upon Which the Ap-	
pellant Intends to Rely on.....	41
Bond on Removal.....	16
Clerk's Certificate to Transcript of Record on	
Appeal	39
Complaint	2
Cost Bond on Appeal.....	34
Defendant's Motion to Quash Service and	
Return of Process, Notice of Hearing and	
Affidavit in Support of Motion.....	18
Affidavit in Support of Motion to Quash	
Service and Return of Process.....	21
Certificate of Winding Up and Dissolution	
of Western-Knapp Engineering Co., a	
California Corp.	23
Revocation of Appointment of Agent and	
Withdrawal from State.....	26

Designation by Appellant of Contents of Record on Appeal.....	37
Minute Entries:	
Oct. 6, 1947—Order Granting Defendant's Motion to Quash Service and Return of Process	27
Dec. 29, 1947—Order Granting Defendant's Motion to Quash Service and Return of Proc- ess, and Quashing Return and Service of Process....	32
Motion to Quash Service and Return of Process	30
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	33
Order of Removal.....	15
Statement of Points Upon Which the Appellant Intends to Rely on Appeal.....	41
Summons and Return.....	13

ATTORNEYS OF RECORD

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Attorneys for Appellee.

In the Superior Court of Maricopa
County, Arizona

CIV-1054 Phx.

No. 57976

ARIZONA BARITE COMPANY, a corporation,
Plaintiff,

vs.

WESTERN-KNAPP ENGINEERING CO., a
corporation,

Defendant.

COMPLAINT

Comes now Arizona Barite Company, hereinafter called plaintiff, complaining of and against Western-Knapp Engineering Co., hereinafter called defendant, and for cause of action alleges:

I.

Plaintiff, Arizona Barite Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona; defendant, Western-Knapp Engineering Co., is a corporation duly incorporated and existing under the laws of the State of California, and is a resident citizen domiciled in said State. At the time this cause of action accrued, said defendant had qualified as a foreign corporation to do and transact business in the State of Arizona and was licensed and authorized, among other things, to transact the character of business it contracted to do as hereinafter

alleged. Prior to the 6th day of May, 1946, plaintiff notified defendant that plaintiff had a claim against defendant, which claim is the basis of this action, for damages and breach of contract, covenants and warranties; that on the 6th day of May, 1946, defendant filed an attempted withdrawal from the State of Arizona and an attempted revocation of agency in derogation and with knowledge of plaintiff's claim, as a design calculated to avoid its obligation to plaintiff, and such withdrawal, being in contravention of the laws and the Constitution of this State, was ineffectual; that service of process may be had upon defendant corporation by serving its designated Agent for service, Mr. J. P. Keller, 1025 South Central Avenue, Phoenix, Arizona, or otherwise, service of process may be had as provided by the Laws of Arizona.

II.

That heretofore, to-wit: on or about the 9th day of August, 1945, plaintiff and defendant duly signed and entered into a contract in writing under the terms and provisions of which defendant, Western-Knapp Engineering Co., agreed and obligated itself to lay out, design, build and construct for plaintiff, Arizona Barite Company, as set forth in said written contract, a one hundred (100) ton Barite Grinding Plant consisting of the following units:

Ramp and surge bin section;

Crushing plant;

Grinding and classification section;

Thickening, filtering and drying section;
Packing, storage and shipping section;
Electric service;
Water supply and fire protection;
Office building;

located upon property owned by Arizona Barite Company and situated near the City of Mesa, Maricopa County, Arizona, all as generally shown on that certain Flowsheet No. WKE106-1-B. The said written contract was signed in duplicate, one signed copy of which was delivered to plaintiff, the other signed copy of which was delivered to defendant.

III.

That by the provisions of said written contract, defendant was obligated to perform all of the work, and furnish and supply all of the materials to design, lay out, build, construct and complete the above described buildings and structures, and covenanted that all of the details of design and workmanship thereof would be the most suitable and safest for the purpose intended, and that all materials and equipment used would be the most suitable and safest for the purpose intended, and that all details of design, workmanship, materials and equipment would be satisfactory to plaintiff. Defendant undertook to perform all of the work, and furnish and supply all of the materials to construct and complete the foregoing improvements and to do everything of all description connected therewith, arising from and out of, or as a result of said

contract, at cost plus a fixed fee of Ten Thousand, Four Hundred and Six Dollars (\$10,406.00), as full compensation for the completion of said Barite Grinding Plant; that the terms and conditions of payment of the fixed fee aforesaid and costs incident to said construction were all fixed and ascertained by the terms and provisions of said written contract.

IV.

That defendant, at the time it submitted its bid and at the time it was awarded said contract, was fully aware that the drying section of the said Barite Grinding Plant was an essential and integral part thereof, and was fully aware of the function of said drying section in said plant as in integral unit of the whole, and know the purpose for which same was being constructed and the use to which it would be put, and knew that if such drying section were faulty or should fail to operate properly, or if it proved inadequate, that the entire Barite producing plant would have to be shut down and would cease operations at great cost and damage to Arizona Barite Company.

V.

Under the terms of such contract and agreement, said drying section, hereinafter referred to as "Lowden Dryer," was to consist of a suitable brick and mortar furnace structure 12' in width and 48' in length, with walls 13" more or less in thickness, housing the mechanical equipment which was to consist of a steel plate or plates approximately 10'

in width, 43' in length and $\frac{1}{2}$ " in thickness, upon and across which moist ground barite was to pass in a continuous manner by a conveyor mechanism; that the heating system used in said Lowden Dryer was to consist of two fuel oil burners capable of thoroughly drying said barite. The said Lowden Dryer was to have the ability and capacity to dry one hundred (100) tons of barite per twenty-four (24) hours; that said contract provided that the Lowden Dryer would be the "most suitable and safest for the purpose intended." Said contract likewise contained express warranties and guaranties that all details of design and workmanship and all materials and equipment covered thereby would be fit and sufficient for the purpose intended, of good material and workmanship, and free from defect. By the terms and provisions of said contract, Western-Knapp Engineering Co. warranted that it "is an expert in the design and construction of ramps, surge bins, crushing plants; grinding and classification sections; thickening, filtering and drying sections; packing, storage and shipping sections"; and all other parts and sections of said Barite Grinding Plant.

VI.

That within a reasonable time after the 9th day of August, 1945, defendant, Western-Knapp Engineering Co., entered upon the premises of plaintiff and entered into the performance of its duties and obligations under and by virtue of the terms of said written contract with plaintiff, and undertook to build and construct said improvements.

VII.

Plaintiff alleges that defendant undertook to and did prepare all plans and engineering designs for the construction of such Lowden Dryer, and all specifications for material and types of construction thereof; that Western-Knapp Engineering Co. used in the construction of said Lowden Dryer an unworkable, archaic plan, design or specification which had been declared impractical by the original designer thereof many years prior to the use and application thereof by defendant, all of which was known to defendant, but was unknown to plaintiff at the time of the use thereof by defendant; that fire clay brick used by defendant in the construction of said drying section was laid in three courses, without regard to a tie-in of said courses one with another at regular intervals and without expansion joints whatsoever in well or points of contact between the floor and walls and without proper regard for port holes; and the brick construction thereof was wholly inadequate for the temperature necessary for the drying of barite; that faulty construction and arrangement of furnace drafts, heating system and port openings permitted uneven heat distribution and heat losses, creating excessive heat in the immediate vicinity of the burners of said Lowden Dryer, without adequately heating the central and delivery end plates, causing the brickwork in arches, side walls and steel plates to separate, bulge, crumble, buckle and fall when the furnace temperature and heat was increased in an effort to bring about the drying process; that no adequate heat controls of any kind or character

were provided upon said structure and that no method or means for the allowance of wide temperature ranges were installed; that upon initial operations and trials of said Lowden Dryer it apparently operated satisfactorily but by virtue of the latent defects aforesaid, when said dryer was brought to temperatures adequate to bring about said drying process and to offset the improper and inadequate construction thereof, on or about the 28th day of April, 1946, said Lowden Dryer completely failed and collapsed; that all of the defects and failures in said construction were due to faulty designing, improper supervision and construction not in keeping with modern methods and engineering; that the foregoing defects and infirmities in workmanship, supervision or materials were unknown to plaintiff but were well known or should have been known to defendant as experts at the time of the delivery thereof as a completed plant and at the time defendant requested plaintiff to deliver to defendant plaintiff's "acceptance" of said Plant; that the latent defects aforesaid caused and brought about the collapse of said Lowden Dryer.

VIII.

That although demand was made upon Western-Knapp Engineering Co., defendant herein, by plaintiff, to place said Lowden Dryer in a satisfactory and useable condition, suitable for the purpose for which it was constructed and intended, defendant failed and refused to do so; that plaintiff has fully and completely complied with and performed all of its obligations under said contract, and has paid

defendant the entire sum of money due and owing to defendant for the construction of the entire Barite Grinding Plant according to the terms and provisions of said written contract, and that plaintiff is guilty of no act or omission causing or justifying defendant to default in its obligation under said contract.

IX.

By reason of the utter collapse of said Lowden Dryer and the negligent acts and omissions of defendant, plaintiff was forced to and did turn to and employ other engineers who were experts to demolish said structure erected by defendant, Western-Knapp Engineering Co., and to re-design, rebuild and cause to be rebuilt in lieu thereof a new and efficient dryer. The cost to plaintiff of employing said expert engineers and of re-designing and of making such necessary repairs and reconstruction was the sum of Six Thousand, Three Hundred Fifty-five and 28/100 Dollars (\$6,355.28); that said re-designing, repairs and reconstruction were necessary to place said Lowden Dryer in an efficient state and condition of operation and said re-designing, repairs and reconstruction did not increase the value of said Lowden Dryer, but only restored and placed it in a workable condition.

X.

Plaintiff further alleges that at the time of the execution of said contract, defendant knew the use to which said barite crushing plant would be put and that it was within the contemplation of plaintiff and defendant that said Barite Grinding Plant

was to be operated for profit by plaintiff and it was contemplated that plaintiff would sustain a great loss of profit in the event said Barite Grinding Plant or any part or section thereof should cease or fail to function or be unfit for use; that it was within the knowledge of plaintiff and defendant that the failure of the said Lowden Dryer would result in the closing down of the entire Barite Grinding Plant and mine where the barite ores were being mined and from which mine the barite ores were being delivered to the Barite Grinding Plant, and that if the entire Barite Grinding Plant and mine were closed down, plaintiff would sustain a great loss in overhead, other labor and maintenance expenses.

XI.

That as a result of the breach of contract and warranties on the part of defendant and the failure of the said Lowden Dryer and the consequent closing down of the entire Barite Grinding Plant, no barite was produced during the period from April 8, 1946, to June 8, 1946, 42 days; that said period of time was a reasonable time within which to have said Lowden Dryer re-designed, repaired and reconstructed and within which to rehabilitate said Lowden Dryer to the condition and state of productivity it should have been but for defendant's faulty construction thereof under its contract with the plaintiff. During such period plaintiff was deprived of profits in the amount of Six Thousand, Nine Hundred Thirty-six and 70/100 Dollars (\$6,936.70) from the operation of said Barite Grinding Plant, and paid out for overhead and

other labor and maintenance expenses of said plant the sum of One Thousand, Two Hundred Seventy-five and no/100 Dollars (\$1,275.00). With respect thereto plaintiff would show that during said 42 day period, by reason of the existing state of war, there existed an urgent demand for barite and the full production of said plant.

XII.

Plaintiff would further allege that on or about the 8th day of April, 1946, at the insistence of defendant, plaintiff delivered to defendant a written statement formally accepting the entire Barite Grinding Plant, wherein plaintiff expressed satisfaction that the mechanical performance of the plant was apparently in accordance with defendant's contractual obligation; that in truth and in fact said drying section of said plant had been in full use and operation for a period of less than six (6) days at the time of said acceptance, and for the period demonstrated satisfactory mechanical performance; that said acceptance was wholly premature in that said drying section collapsed, failed and became wholly unuseable, by virtue of said latent defects and defects known only to defendant, its agents, servants and employees as experts, immediately after said acceptance, and that a reasonable time for the demonstration of satisfactory mechanical performance of said Lowden Dryer, in accordance with defendant's obligations under the specifications therefor, was not allowed and the said acceptance should be and is cancelled and held for naught.

Wherefore, premises considered, plaintiff, Arizona Barite Company, prays that it have and recover judgment of and against Western-Knapp Engineering Co. for the sum of Six Thousand, Three Hundred Fifty-five and 28/100 Dollars (\$6,355.28), the cost to plaintiff of re-designing, reconstruction of and making necessary repairs to the Lowden Dryer; for the further sum of One Thousand, Two Hundred and Seventy-five Dollars (\$1,275.00), the amount of overhead, other labor and maintenance expenses incurred and paid; and for the additional sum of Six Thousand, Nine Hundred Thirty-six and 70/100 Dollars (\$6,936.70), the amount of lost profits, all of said amounts with interest at the legal rate from the date of filing of this complaint until paid; for costs of court; and for such other and further relief, either at law or in equity, to which plaintiff may show itself fully entitled.

ARIZONA BARITE COMPANY
STOCKTON & KARAM,

By HENDERSON STOCKTON,
Security Building, Phoenix,
Arizona.

FULBRIGHT, CROOKER,
FREEMAN & BATES,

By HUGH O. BUCK,
State National Building,
Houston 2, Texas.

/s/ FRED J. ELLIOTT,
Security Building,
Phoenix, Arizona.

[Endorsed]: Filed April 28, 1947.

In the Superior Court of Maricopa County, Arizona
No. 57976, Div. 1.

ARIZONA BARITE COMPANY, a corporation,
Plaintiff,

vs.

WESTERN-KNAPP ENGINEERING CO., a
corporation,
Defendant.

SUMMONS

The State of Arizona to the above named defendant,
Western-Knapp Engineering Co., a corporation.
Greeting:

You are hereby summoned and required to appear and defend in the above entitled action in the above entitled court, within twenty days, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, or within thirty days, exclusive of the day of service, if served without the State of Arizona, and you are hereby notified that in case you fail so to do, judgment by default will be rendered against you for the relief demanded in the complaint.

The names and addresses of plaintiff's attorneys are: Fulbright, Crooker, Freeman & Bates, State National Bank Building, Houston 2, Texas; Fred J. Elliott and Stockton & Karam, 507-12 Security Building, Phoenix, Arizona.

Given under my hand and the seal of the Superior Court of Maricopa County, Arizona, this 28th day of April, 1947.

[Seal] WALTER S. WILSON,
Clerk,
By BEAUMONT SMITH,
Deputy Clerk.

[Endorsed]: Filed May 6, 1947.

State of Arizona,
County of Maricopa—ss.

I hereby certify that I received the within Summons on the 29th day of April, A.D. 1947, at the hour of 4:20 p.m., and personally served the same on the 2d day of May, A.D. 1947, on Western-Knapp Engineering Co., a corporation, being the said defendant named in said Summons by delivering to J. P. Keller, in person, as Statutory Agent for Western-Knapp Engineering Co., in the County of Maricopa, a copy of said Summons to which was attached a true copy of the Complaint mentioned in said Summons.

Dated this 2d day of May, A.D. 1947.

Fees—Service	\$1.50
1 mile, traveled one way.....	.30
Total	<u>\$1.80</u>

L. C. BOIES,
Sheriff,
A. K. KING,
Deputy Sheriff.

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

This cause coming on for hearing upon the petition of J. H. How, J. N. How, and Clara How in the name and on behalf of Western-Knapp Engineering Co., a corporation, defendant in the above entitled cause, for an order removing this cause to the District Court of the United States for the District of Arizona, and it appearing to this Court that said petitioners have filed said petition for such removal in due form and within the time required by law, and that said petitioners have filed bond herein duly conditioned as provided by law, and it being shown to the Court that the notice required by law of the filing of said bond and petition had, prior to the filing thereof, been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the statute, and it appearing to this Court that this is a proper cause for removal to said District Court of the United States, this Court does now hereby accept and approve said bond and said petition; and

It Is Ordered that the above entitled cause be and the same is hereby removed to the District Court of the United States for the District of Arizona; and

It Is Further Ordered that all other proceedings in this Court herein be stayed, and that the Clerk

of this Court be and he is hereby directed to make up the record in this cause for transmission to said District Court forthwith.

Done in Open Court this 21st day of May, 1947.

M. T. PHELPS,

Judge.

[Endorsed]: Filed May 21, 1947.

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men by These Presents:

That we, J. H. How, J. N. How and Clara How in the name and on behalf of Western-Knapp Engineering Co., a corporation, as Principal, and American Employers Insurance Company, as Surety, are held and firmly bound unto Arizona Barite Company, a corporation, the plaintiff in the above entitled cause, its successors and assigns, in the penal sum of One Thousand and No/100 (\$1,000.00) Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents.

The conditions of this obligation are that, whereas J. H. How, J. N. How and Clara How in the name and on behalf of Western-Knapp Engineering Co., a corporation, have applied by petition to the Superior Court of the County of Maricopa and State of Arizona, for the removal of the above en-

titled cause from said Superior Court to the District Court of the United States for the District of Arizona;

Now, if the said J. H. How, J. N. How and Clara How in the name and on behalf of Western-Knapp Engineering Co., a corporation, shall enter in the District Court of the United States for the District of Arizona within thirty (30) days of the date of filing of the petition for such removal, a certified copy of the record in said suit, and shall well and truly pay all the costs that may be awarded by said District Court, if it shall hold that said suit was wrongly or improperly removed there, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof this instrument is executed this 20th day of May, 1947.

J. H. HOW,
J. N. HOW,
CLARA HOW,

In the name and on behalf of Western-Knapp Engineering Co., a corporation,

By HERBERT MALLAMO,
Their Attorney,
Principal.

[Corporate Seal]

AMERICAN EMPLOYERS
INSURANCE COMPANY,
By R. L. CHARLES,
Its Attorney in Fact,
Surety.

Approved May 5, 1947.

[Endorsed]: Filed May 21, 1947.

In the District Court of the United States
for the District of Arizona

Civil 1054—Phx.

ARIZONA BARITE COMPANY, a corporation,
Plaintiff,

vs.

WESTERN-KNAPP ENGINEERING CO., a
corporation,

Defendant.

DEFENDANT'S MOTION TO QUASH SERV-
ICE AND RETURN OF PROCESS, NO-
TICE OF HEARING AND AFFIDAVIT IN
SUPPORT OF MOTION

Comes Now J. H. How, J. N. How and Clara How in the name and on behalf of Western-Knapp Engineering Co., a corporation, defendant, appearing specially, by their attorneys undersigned, and for the sole purpose of this motion only, and for no other purpose, and without submitting to the jurisdiction of this Court, moves the Court to quash the summons issued in this action, and the service and return thereof, upon the grounds and for the reasons as follows:

1. That Western-Knapp Engineering Co., a corporation, was organized under and by virtue of the laws of the State of California;

2. That said Western-Knapp Engineering Co., a corporation, was, on or about the 8th day of August, 1945, duly qualified and admitted to transact

its corporate business within the State of Arizona; that J. P. Keller was duly named and appointed statutory agent therefor.

3. That subsequently, on or about the 6th day of June, 1946, said Western-Knapp Engineering Co., a corporation, duly revoked the appointment of said J. P. Keller, as its lawful agent in and for the State of Arizona, for and in behalf of said corporation to accept and acknowledge service of any and all process or processes; and that said Western-Knapp Engineering Co., a corporation, defendant herein, ceased to transact business within said State of Arizona and withdrew therefrom; that from said date and ever since said defendant corporation has not carried on or transacted business within said State; nor has said defendant corporation had any agent or employee within the State of Arizona during all such time; that J. P. Keller has never been and is not now, an employee of said defendant corporation, for any purpose whatsoever;

4. That said J. P. Keller was not, when process in this cause was served upon him, and is not now, the agent or employee of said defendant corporation herein for any purpose whatsoever.

5. That on or about the 3rd day of January, 1947, said Western-Knapp Engineering Co., a corporation, was duly dissolved pursuant to the laws of the State of California.

All of which more particularly appears from the affidavits of J. P. Keller hereto attached and made a part hereof; and the authenticated copies of said

revocation, withdrawal and dissolution, herein alleged; and attached hereto as Exhibit A; and Exhibit B, and made a part hereof.

This motion is made and based upon the affidavit aforesaid; the exhibits attached hereto; and the records, files, and pleadings herein; this motion and the notice thereof.

LESLIE PARRY,
/s/ HERBERT MALLAMO,
Attorneys for Defendant.

NOTICE

To: Fulbright, Crocker, Freeman & Bates: Fred J. Elliot and Stockton & Karam: Attorneys for Plaintiff:

You and Each of You Please Take Notice that the above entitled Motion to Quash Service and Return of Process in this action, will be called up for hearing at the next regular call of the Law and Motion Calendar of said Court, in the Federal Court House Building, Phoenix, Arizona, at which time and place you may appear and take such part as you deem proper.

LESLIE PARRY,
/s/ HERBERT MALLAMO,
Attorneys for Defendant.

Received Service of the foregoing this 24th day of June, 1947.

STOCKTON & KARAM,
FRED J. ELLIOTT,
Attorneys for Plaintiff,
per EDa.

AFFIDAVIT IN SUPPORT OF MOTION TO
QUASH SERVICE AND RETURN OF
PROCESS

State of Arizona,
County of Maricopa—ss.

J. P. Keller, being first duly sworn upon his oath
deposes and says:

1. That Western-Knapp Engineering Co., a
corporation, was heretofore organized under and
by virtue of the laws of the State of California.

2. That said Western-Knapp Engineering Co.,
a corporation, was, on or about the 8th day of
August, 1945, duly qualified and admitted to trans-
act its corporate business within the State of Ari-
zona; that your affiant, J. P. Keller, was duly ap-
pointed statutory agent therefor.

3. That subsequently, on or about the 6th day
of June, 1946, said Western-Knapp Engineering
Co., a corporation, duly revoked the appointment
of your affiant, J. P. Keller, as its lawful agent in
and for the State of Arizona, for and in behalf of
said corporation to accept and acknowledge service
of any and all process or processes; and further
said Western-Knapp Engineering Co., a corpora-
tion, defendant herein, ceased to transact business
in said State of Arizona and withdrew therefrom;
that from said date, and ever since, said defendant
corporation has not carried on or transacted busi-
ness within said State; nor has said defendant cor-
poration had any agent or employee within the State

of Arizona during all such time; that your affiant has never been, and is not now, an employee of said defendant Corporation, for any purpose whatsoever.

4. That your affiant, J. P. Keller, was not when process in this cause was served upon him, and is not now, the agent or employee of said defendant corporation herein for any purpose whatsoever.

/s/ J. P. KELLER.

Subscribed and sworn to before me this 24th day of June, 1947.

[Seal] LESLIE PARRY,
Notary Public.

My Commission Expires December 19, 1950.

State of California, Office of the Secretary of State

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That I have compared the annexed transcript with the Record on file in my office, of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

In Witness Whereof, I hereunto set my hand and affix the Great Seal of the State of California this 8th day of May, 1947.

[Seal] /s/ FRANK M. JORDAN,
Secretary of State,

By /s/ [Illegible]
Deputy.

CERTIFICATE OF WINDING UP AND DIS-
SOLUTION OF WESTERN-KNAPP ENGI-
NEERING CO., A CALIFORNIA CORPOR-
ATION

Filed in the office of the Secretary of State of the State of California Jan. 3, 1947. Frank M. Jordan, Secretary of State; By /s/ Robert V. Jordan, Assistant Secretary of State.

[Stamped]: Office of Secretary of State. Corporation Number 165811.

The undersigned do hereby certify that they are all the Directors of Western-Knapp Engineering Co., a California corporation; and they do further hereby certify and state:

One: That on the 12th day of December, 1946, a Certificate, signed and acknowledged in accordance with Section 400 of the California Civil Code, was filed with the California Secretary of State stating that said Corporation had elected to wind up and dissolve; that a copy of said Certificate duly certified by said Secretary of State was thereafter on the 17th day of December, 1946, filed in the office of the County Clerk of the City and County of San Francisco, California, being in the county in which the principal office of said Corporation is located.

Two: That the Directors of said Corporation have heretofore caused written notice of the commencement of the winding up of said Corporation to be given by mail to all its shareholders and to all its known creditors and claimants whose addresses appear on the records of the Corporation, in accordance with Section 400a of the Civil Code.

Three: That said Corporation has been completely wound up, its known assets distributed, any tax or penalty due under the Bank and Corporation Franchise Tax Act paid, and its other known Debts and Liabilities actually paid or adequately provided for and that said Corporation is therefore dissolved.

In Witness Whereof, the undersigned have executed this Certificate this 31st day of December, 1946.

/s/ J. N. HOW,

/s/ J. H. HOW,

/s/ CLARA HOW,

All of the Directors of Western-Knapp Engineering Co.

State of California,

City and County of San Francisco—ss.

On this 31st day of December, 1946, before me, Louis Wiener, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared H. N. How, J. H. How and Clara How, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this Certificate first above written.

/s/ LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

State of Arizona, Office of the Secretary

United States of America,
State of Arizona—ss.

I, Dan E. Garvey, Secretary of State, do hereby certify that Mel D. Michael, whose name is subscribed to the attached certificate as Secretary of the Arizona Corporation Commission, is the duly appointed Secretary of such Commission, and legally qualified to perform the duties of that office; that the seal thereto attached is the seal of the Arizona Corporation Commission, and I verily believe the signature of Mel D. Michael to be genuine.

In Witness Whereof I have hereunto set my hand and affixed the Great Seal of the State of Arizona. Done at Phoenix, the capital, this 20th day of June, A.D. 1947.

[Seal] /s/ DAN E. GARVEY,
Secretary of State.

State of Arizona, Arizona Corporation Commission

To all to Whom these Presents shall Come, Greeting:

I, Mel D. Michael, Secretary of the Arizona Corporation Commission, do hereby certify that the annexed is a true and complete transcript of the Revocation of Appointment of Agent and Withdrawal from State of Western-Knapp Engineering Co., which was filed in the office of said Arizona

Corporation Commission on the 6th day of June, A.D. 1946 at 11:00 o'clock a.m. as provided by law.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the Arizona Corporation Commission, at the Capitol in the City of Phoenix, this 20th day of June, 1947 A.D.

[Seal] /s/ MEL D. MICHAEL,
Secretary.

(This form to be used where the company withdraws from all counties of the State in which it is qualified.)

STATE OF ARIZONA REVOCATION OF AP-
POINTMENT OF AGENT AND WITH-
DRAWAL FROM STATE

Know All Men by these Presents:

That Western-Knapp Engineering Co., a corporation duly organized and existing under the laws of the State of California, does hereby revoke the appointment of J. P. Keller of 1025 So. Central Avenue, Phoenix, Arizona, as its lawful agent in and for the State of Arizona for and in behalf of said company to accept and acknowledge service of all process or processes; and further, does hereby certify that the said Western-Knapp Engineering Co. has ceased to transact business in Arizona and has withdrawn therefrom.

In Witness Whereof, said corporation has caused its corporate name and seal to be hereunto sub-

scribed and affixed by its President and its Asst. Secretary this 31st day of May, 1946.

[Corporate Seal]

WESTERN-KNAPP
ENGINEERING CO.,

By /s/ (Can't read signature),
President.

By /s/ (Can't read signature),
Asst. Secretary.

Arizona Corporation Commission, Incorporating Division. Filed at 11:00 a.m., at request of Robert Creighton, whose address is Arizona Title Bldg., Phoenix.

GEO. McNEIL,
Secretary,

By /s/ H. JOHNSON.

[Endorsed]: Filed June 24, 1947.

In the United States District Court
for the District of Arizona

Minute Entry of Monday, October 6, 1947

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause.]

ORDER GRANTING DEFENDANT'S MOTION
TO QUASH SERVICE AND RETURN OF
PROCESS

Defendant's Motion to Quash Service and Return of Process having been argued, submitted and by the Court taken under advisement,

It Is Ordered that said Motion be and it is granted.

(Notation made in civil docket 10/6/47.)

In the United States District Court
for the District of Arizona

Civil 1054—Phx.

ARIZONA BARITE COMPANY, a corporation,
Plaintiff,

vs.

WESTERN-KNAPP ENGINEERING CO., a
corporation,
Defendant.

ADDITIONAL SUMMONS

To the above named Defendant: Western-Knapp
Engineering Co., a corporation:

You are hereby summoned and required to serve upon Fulbright, Crooker, Freeman & Bates, State National Bank Building, Houston 2, Texas; Fred J. Elliott and Stockton & Karam, 507-12 Security Building, Phoenix, Arizona, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated this 13th day of November, 1947.

[Seal]

WM. H. LOVELESS,
Clerk of Court,

By GERTRUDE I. BITTING,
Deputy Clerk.

RETURN ON SERVICE OF WRIT

United States of America,
.....District of Arizona—ss.

I hereby certify and return that I served the annexed Additional Summons on the therein-named Western-Knapp Engineering Co., a corporation, by serving two copies of Additional Summons with copy of complaint attached to each, by handing to and leaving a true and correct copy thereof with Mel Michael, Secretary of the Arizona Corporation Commission, at his office in Capitol Annex Building, cor., of No. 17th Av., and West Adams St., at 4:10 p.m. and showing him the original personally at Phoenix in said District on the 5th day of December, 1947.

B. J. McKINNEY,
U. S. Marshal,

By FRANKLIN S. WILLETS,
Deputy.

Service\$4.00

Travel24

[Endorsed]: Filed December 19, 1947.

[Title of District Court and Cause.]

MOTION TO QUASH SERVICE AND
RETURN OF PROCESS

Comes Now J. H. How, J. N. How and Clara How in the name and on behalf of Western-Knapp Engineering Co., a corporation, defendant, appearing specially, by their attorneys undersigned, and for the sole purpose of this motion only, and for no other purpose, and without submitting to the jurisdiction of this Court, move the Court to quash the summons issued out of this Court, in the above numbered and entitled action, and service or purported service and return thereof.

This motion is made and based upon the affidavits, exhibits and pleadings heretofore filed herein on behalf of said defendant; the Order of this Court made and entered on October 6th, 1947, granting said defendant's motion to quash service and return of process in this action, by this reference made a part hereof, the files, records, pleadings herein; and the Notice of this Motion.

LESLIE PARRY,
/s/ HERBERT MALLAMO,
SHAPRO & ROTHSCHILD,
Attorneys for Defendant.

NOTICE

To: Arizona Barite Company, a corporation; Plaintiff; and to Fulbright, Crooker, Freeman & Bates; Fred J. Elliott, and Stockton & Karam: Attorneys for Plaintiff:

You and Each of You Please Take Notice that the above entitled motion to quash will be called up at the next regular call of the Law and Motion Calendar, for hearing before the above entitled Court, in the Federal Court House Building, Phoenix, Arizona, at which time and place you may appear and take such part as you deem proper.

LESLIE PARRY,
/s/ HERBERT MALLAMO,
SHAPRO & ROTHSCHILD,
Attorneys for Defendant.

Received Service of the foregoing this 24th day of December, 1947.

STOCKTON & KARAM,
By WILMOT W. TREW,
Attorneys for Plaintiff.

[Endorsed]: Filed December 26, 1947.

In the United States District Court
for the District of Arizona

Minute Entry of Monday, December 29, 1947

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

ORDER GRANTING DEFENDANT'S MOTION
TO QUASH SERVICE AND RETURN OF
PROCESS, AND QUASHING RETURN
AND SERVICE OF PROCESS

Motion of defendant to Quash Service and Return of Process comes on regularly for hearing this day. Henderson Stockton, Esquire, appears as counsel for plaintiff. Herbert Mallamo, Esquire, appears as counsel for defendant.

Said Motion of Defendant to Quash Service and Return of Process is now argued by respective counsel, and

It is Ordered that Defendant's Motion to Quash Service and Return of Process be and it is granted, and that Service and Return of Process issued November 13, 1947, be and it is quashed.

On motion of Henderson Stockton, Esquire,

It Is Ordered that the record show service and return of process issued April 28, 1947, be and it is quashed.

(Notation made in civil docket 12/29/47.)

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

Notice Is Hereby Given that Arizona Barite Company, a corporation, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain order duly given, made and entered by the United States District Court for the District of Arizona on the 6th day of October, 1947, granting the motion of defendant to quash service and return of process, in the above entitled and numbered cause; and from that certain order duly given, made and entered by the United States District Court for the District of Arizona on the 29th day of December, 1947, quashing service and return of process (personal service upon agent) in the above entitled and numbered cause; and from that certain order duly given, made and entered by the United States District Court for the District of Arizona on the 29th day of December, 1947, granting the motion of defendant to quash service and return of process, and quashing service and return of process (service upon Arizona Cor-

poration Commission) in the above entitled and numbered cause.

Dated: January 3, 1948.

STOCKTON & KARAM,
FRED J. ELLIOTT,
507 Security Building,
Phoenix, Arizona,

FULBRIGHT, CROOKER,
FREEMAN & BATES,
State National Building,
Houston 2, Texas,

HENDERSON STOCKTON,
Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed January 3, 1948.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by these Presents:

That Arizona Barite Company, a corporation, Plaintiff and Appellant in the above-entitled cause, as Principal, and National Surety Corporation, a New York corporation of New York City, New York, duly authorized to transact a surety business in the State of Arizona, as Surety, are held and firmly bound unto Western-Knapp Engineering

Co., a corporation, its successors and assigns, in the penal sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Given under our hands and seals this, the 3d day of January, 1948.

Whereas, the above-named Arizona Barite Company, Plaintiff and Appellant, has filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the orders (judgments) of the United States District Court for the District of Arizona in the above-entitled cause entered and docketed respectively on the 6th day of October, 1947, and on the 29th day of December, 1947;

Now, Therefore, the condition of this obligation is such that if the above named Arizona Barite Company, a corporation, plaintiff and appellant, shall prosecute its said appeal to effect and shall satisfy any judgment for costs which may be adjudged against the said Arizona Barite Company, a corporation, plaintiff and appellant, in full, then this obligation to be void; otherwise, to remain in full force and virtue.

In Witness Whereof, the said Arizona Barite Company, a corporation, has executed this bond for costs on appeal by its agent thereunto first duly authorized, and said Surety has caused its name and

seal to be hereunto affixed by its duly authorized attorney in fact at Phoenix, Arizona, on the 3d day of January, 1948.

ARIZONA BARITE
COMPANY,
By HENDERSON STOCKTON,
Agent,
Principal.

[Corporate Seal]

NATIONAL SURETY
CORPORATION,
a corporation,
By ERNEST E. SUGGS,
Attorney-in-Fact,
Surety.

Received copy of the within bond this, the
day of January, 1948.

.....

Attorneys for Defendant and
Appellee.

[Endorsed]: Filed January 3, 1948.

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF CON-
TENTS OF RECORD ON APPEAL

To the Clerk of the above named Court:

The Appellant respectfully requests that the entire record and proceedings be included and contained in the Record on Appeal. The entire record and proceedings consist of the following:

1. Plaintiff's complaint, filed April 28, 1947;
2. Summons and return of summons, filed May 6, 1947;
3. Petition for Removal, filed May 21, 1947;
4. Order Shortening Time for Hearing Petition for Removal, filed May 21, 1947;
5. Notice of filing Petition to Remove and of hearing thereon, filed May 21, 1947;
6. Order of removal, filed May 21, 1947;
7. Bond on Removal, filed May 21, 1947;
8. Minute Entries of Superior Court of Maricopa County, State of Arizona, of May 21, 1947;
9. Certificate of Clerk of Superior Court of Maricopa County, Arizona, certifying the Record on Removal;

all of the above filed in the United States District Court on June 19, 1947;

10. Notice of Filing Transcript on Removal, filed June 19, 1947;
 11. Motion to Quash Service and Return of Process, filed June 24, 1947;
-

12. Affidavit of J. P. Keller in Support of Motion to Quash Service and Return of Process, and exhibits thereto attached, filed June 24, 1947;
13. Memorandum of Authorities in Support of Motion to Quash Service of Process, filed June 24, 1947;
14. Brief and Memorandum of Authorities in Opposition to Motion to Quash Service of Process, filed June 27, 1947;
15. Praecipe for Summons, filed November 13, 1947;
16. Additional Summons and United States Marshal's return thereof, filed December 19, 1947;
17. Motion to Quash Service and Return of Process, filed December 26, 1947;
18. All minute entries in this cause;
19. Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, filed January 3, 1948;
20. Cost Bond on Appeal, filed January 3, 1948; and
21. This Notice.

Dated at Phoenix, Arizona, this 9th day of January, 1948.

STOCKTON & KARAM,
FRED J. ELLIOTT,
FULBRIGHT, CROOKER.
FREEMAN & BATES,
HENDERSON STOCKTON,
Attorneys for Appellant.

Received copy of the within Designation by Appellant of Contents of Record on Appeal this day of January, 1948.

LESLIE PARRY,
HERBERT MALLAMO,
SHAPRO & ROTHCHILD,
HERBERT MALLAMO,
Attorneys for Appellee.

[Endorsed]: Filed Jan. 10, 1948.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Arizona Barite Company, a corporation, Plaintiff, vs. Western-Knapp Engineering Co., a corporation, Defendant, numbered Civ. 1054 Phoenix on the docket of said Court.

I further certify that the attached pages numbered 1 to 66 inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and desig-

nated in the Designation filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$6.70 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 3rd day of February, 1948.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 11853. United States Circuit Court of Appeals for the Ninth Circuit. Arizona Barite Company, a Corporation, Appellant, vs. Western-Knapp Engineering Co., a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed February 5, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11853

ARIZONA BARITE COMPANY, a corporation,
Appellant,

vs.

WESTERN-KNAPP ENGINEERING CO., a
corporation,
Appellee.

STATEMENT OF POINTS UPON WHICH
THE APPELLANT INTENDS TO RELY
ON APPEAL

The Court erred in the following particulars:

- (1) In granting the motion of defendant to quash service and return of process, and in quashing service and return of process issued April 28, 1947, for the reason that after dissolution or withdrawal from doing business in a state other than the state of its creation, a corporation retains its corporate identity for purposes of winding up its affairs. Service of process may be made upon agent who was such at time of withdrawal from State, no officer or officers being domiciled within the State from which the corporation withdrew from the transaction of business; and

- (2) In granting the motion of defendant to quash service and return of process, and in quashing service and return of process issued November 13, 1947, for the reason that service of process may be made upon a foreign corporation that has qualified to do business in Arizona after its withdrawal from doing business in Arizona by service upon the Arizona Corporation Commission in an action involving acts of business transacted in the State before withdrawal under the Constitution of Arizona and statutory enactments.

It is provided by Section 5 of Article 14 of the Constitution of Arizona, in substance, that a foreign corporation cannot do business in Arizona upon more favorable conditions than are prescribed by law for similar corporations organized under the laws of the State of Arizona.

It is provided by Sec. 53-804, Arizona Code 1939, in substance, that a foreign corporation, upon complying with the provisions of the Arizona law, shall "have and enjoy the same rights and privileges held and enjoyed by a like domestic corporation."

Sec. 21-314, Arizona Code 1939 provides that "when a domestic corporation does not have an officer or agent in this state upon whom legal service of process can be made, summons may be served upon such corporation by depositing two (2) copies

thereof in the office of the Corporation Commission, which shall be deemed personal service upon such corporation.”

Dated at Phoenix, Arizona, this 5th day of February, 1948.

STOCKTON & KARAM,
FRED J. ELLIOTT,
FULBRIGHT, CROOKER,
FREEMAN & BATES,
/s/ S. N. KARAM,
Attorneys for Appellant.

Received copy of the within Statement of Points Upon Which the Appellant Intends to Reply on Appeal this 5th day of February, 1948.

LESLIE PARRY,
HERBERT MALLAMO,
SHAPRO & ROTHSCHILD,
/s/ H. MALLAMO,
Attorneys for Appellee.

[Endorsed]: Filed February 10, 1948.

